

In Re: National Hydroelectric

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Overruled by : National Hydroelectric Power Corpn. Ltd. Vs. Commissioner of Income Tax

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Court : Authority for Advance Rulings

Decided On : Dec-17-2004

Reported in : (2005)193CTRAAR594

Judge : S S Quadri, K Singh

Appellant : In Re: National Hydroelectric

Judgement :

Appellants: In Re: National Hydroelectric Power Corporation Ltd. Vs.

For Appellant/Petitioner/Plaintiff: V.U. Eradi, Pawan Kumar and Piyush Kaushik, Adv.

Income Tax Act, 1961 - Sections 32 and 115JB; Electricity (Supply) Act; Companies Act - Section 209Surana Steels (P) Ltd. v. Dy. CIT, (1999) 237 ITR 777 (SC); Apollo Tyres Ltd. v. CIT, (2002) 255 ITR 273 (SC); CIT v. Anand Theatres, (2000) 244 ITR 192 (SC); Vazir Sultan Tobacco Co. Ltd. v. CIT, (1981) 132 ITR 559 (SC) 1. M/s National Hydroelectric Power Corporation Ltd. (NHPC), a public sector undertaking, filed this application under Section 245Q(1) of the IT Act, 1961 (for short the "Act"), seeking advance rulings of the Authority on the questions mentioned at the end of this para. It is engaged in the construction and operation of hydroelectric power projects. The power generated by the applicant is

supplied to various States/State Electricity Boards (hereinafter referred to as "beneficiaries") at tariff rates notified by Central Electricity Regulatory Commission (CERC) of the Government of India. The tariff is fixed by CERC for each generating station separately. The components of the tariff are : (a) the basic expenses incurred by the company; (b) depreciation and advance against depreciation (for short AAD); (c) return on equity; and (d) incentive for higher production. The usual life of a plant for working out component (b) is taken between 25 and 30 years. Under the rules, the total depreciation which includes AAD cannot exceed 90 per cent of the capital cost during the life of the project but 90 per cent of the cost is allowed to be recovered, is through tariff over a shorter period of 12 years. The AAD component of the tariff is meant to facilitate repayment of loan taken by a company for the equipments/projects. On capital assets depreciation is an allowable deduction under Section 32 of the Act, which is calculated on straight-line method at the rates prescribed under the Electricity (Supply) Act, 1948, as notified from time to time. As an accounting policy the applicant has reduced from the total sales of the year, the amount representing AAD component in the tariff and shown it as income received in advance on the liability side of the balance sheet to be transferred to sales in P&L a/c in subsequent years, namely, when the depreciation charged in the book is more than the depreciation rate, fixed for tariff purposes. The applicant's case is that the AAD cannot be taken into consideration while computing the book profit for the purposes of minimum alternate tax (for short the "MAT") under the provisions of Section 115JB of the Act. In support of its case, it relies on the expert opinion of : (a) expert advisory committee of the Institute of Chartered Accountants of India; and (b) the Price Waterhouse & Company. On these facts, the applicant seeks advance rulings of the Authority on the following questions : (a) As to whether the amount of advance against depreciation is to be included for the computation of "book profit" under Section 115JB of the IT Act in the year of receipt or in the year the depreciation relates to.

(b) As to whether the said amount of advance against depreciation can be treated as applicant's income under Section 28(i) of the IT Act in the year of receipt or in the year the depreciation relates to.

2. In the comments of the CIT, the facts stated by the applicant are not disputed. It is stated that Section 209 of the Companies Act, 1956, (hereinafter referred to "Companies Act"), specifically requires that accounts should be kept on accrual basis, and any system of accounting other than accrual basis is not permissible so the company cannot recast the accounts. Accrual basis applies also to preparation of the P&L a/c. The applicant has received AAD as part of the sale price as per notified tariff and has credited the same to the P&L a/c. It cannot deduct the AAD component of tariff for purposes of calculating book profit. What can be reduced from the book profit is clearly identified and defined in the Explanation to Section 115JB of the Act. It is stated that the Hon'ble Supreme Court in *Surana Steels (P) Ltd. v. Dy.*

(1999) 237 ITR 777 (SC) held that the AO can compute the income for the purposes of MAT on the book profit under company law subject to adjustments specifically authorized by the Act for purposes of book profit tax. The amount of AAD accrues to the applicant at the time of supplying power to beneficiaries as sale price which is quantified at the time of raising the bill. The book profit has to be arrived at from P&L a/c prepared according to Parts II and III of Sch. VI of the Companies Act. In the additional comments filed by the CIT it is added that the assessee while making computation of income for the asst. yrs.

1996-97 to 2000-01 used to include the said amount of AAD while working out profits under Section 23(i) of the Act. It, however, discontinued that practice after asst. yr. 2001-02. This change of stand by the applicant is not permissible in law.

3. At the outset, we may record that question (b) is not pressed by Mr.

V.U. Eradi, advocate, who appeared for the applicant. The sole question that survives for consideration is question (a) noted above.

4. Mr. V.U. Eradi argued that the applicant prepared its P&L a/c on the basis of the advice of the expert advisory committee of the Institute of Chartered Accountants of India and accordingly AAD amounting to Rs. 133.8 crores was shown as a deduction from the sales of power treating it as revenue received in advance which would be adjusted in the later years. For the accounting year ending on 31st

March, 2001 the total amount representing sale was Rs. 1142.8 crores after deducing AAD component of Rs. 133.8 crores. The AO did not accept the book profit thus arrived at as the total income of the relevant assessment year under Section 115JB, which would be contrary to the judgement of the Hon'ble Supreme Court in Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273 (SC). After the annual accounts of the applicant were audited, they were laid before the annual general meeting and were approved; the applicant being a Government company, the Comptroller and Auditor General (for short the "CAG") has power to conduct supplementary or test audit of the company's account and to direct the manner in which the company's account should be audited by the auditor and accordingly the supplementary audit was also done by the office of CAG. The figure of sale, Rs. 1142.8 crores, adopted after deduction of AAD (Rs. 133.8 crores) was approved. The annual accounts were also laid before both the Houses of Parliament in accordance with the statutory requirement in Companies Act. In the return of income for the asst. yr. 2001-02 filed by the applicant on 30th Oct., 2001, it was indicated that the question as to whether the provisions of Section 115JB would apply in relation to the amount of AAD (Rs. 133.8 crores) is sub judice before the Authority and as such the same is not included for the purposes of computing MAT. This does not have any effect on the question of finality of the accounts. The result of the application before the Authority also would not have any impact on the finality of the P&L a/c because the net profit as per Part n and Part HI of Sch. VI of the Companies Act would remain unaltered under all circumstances, It is further argued that the applicant's P&L a/c for the relevant previous year was prepared in the manner laid down in Sub-section (2) of Section 115JB which would correspond to Sub-section (1A) to Section 115J. None of the clauses of the Explanation is attracted, therefore, the AO cannot reject the figures of book profit mentioned in the P&L a/c of the company.

5. Mr. N.P. Sahani, advocate, appearing for the CIT, has argued that AAD is nothing but a part of tariff (sales price) charged by the company for supply of the energy; AAD is not shown separately in the bills. The tariff mechanism is intended to prevent electricity generating companies from charging high rates or earning high margin of profit. Once the notification of the tariff is issued by CERC, the individual components lose their significance and relevance in the absence of any

provision in any rule or notification, the applicant is not justified in picking up AAD, a specific item of tariff, and giving it a separate treatment in the regular accounts which are required to be maintained in accordance with the Companies Act. The AAD cannot be treated as advance tariff, if that were so, it would not have found part of invoiced sale price and it would also not form part of gross sale as turnover of the company. There was no case of adjustment or reduction of particular tariff component from gross sale, credited to P&L a/c. The applicant itself had been adding back AAD from asst. yr.

1996-97 and when this practice was deviated in 1998-99, the AO added back the same, which was not disputed by the applicant in appeal. It is only after MAT provisions were made applicable to electricity generating companies from 1st April, 2001, that the applicant sought advance ruling from the Authority and in the significant accounting policies for the financial year 2001-02, inter alia, indicated in Clause (d) of para 10.1 that AAD was a component of tariff in the initial years to facilitate repayment of loans; it was on that basis the AAD component was reduced from the sales and shown as deferred income to be included in the sales in the subsequent years. To comply with Accounting Standard 22 'On accounting for taxes on income' as against the deferred tax assets as on 31st March, 2002, one of the items of assets-Item n-is given as "AAD to be considered as income in tax computation". Whereas other items were added back in computing book profit under Section 115JB, AAD has not been treated identically; the book profit cannot be said to be properly computed. The AAD is neither in the nature of depreciation nor advance. Reliance on the opinion of the experts advisory committee of Institute of Chartered Accountants of India (ICAI) cannot be accepted, as the Institute is not competent to express its opinion on interpretation of law and the taxability of AAD. The decision of the Supreme Court in the Apollo case (supra) would not apply to the facts and circumstances of the present case as the provisions of Section 115JB are materially different from the provisions of 115J; the proviso to Sub-Section (2) of Section 115JB is absent in Section 115J. Parts n and m of Sch. VI to the Companies Act read with the relevant accounting standards are not followed; the report of the statutory auditors is qualified. The accounting practice and policy of the company in regard to AAD cannot override the statutory provisions and mandatory accounting standards. The prescribed

accounting standards are mandatory both under the IT Act as well as Companies Act. If AAD is treated in the nature of capital reserve, it has to be adjusted/added back while computing book profit for purposes of Section 115JB; if the applicant could justify deduction of AAD from the gross sales being in the nature of reserve or provision, then also it has to be added back. In view of the Explanation to Section 115JB, statutory auditors have qualified AAD as not being in accordance with requirement of Companies Act and the mandatory accounting standards. A provision is a charge on the profits and a reserve is obligation or appropriation of income and both are liable to be added back while computing book profit for the purpose of Section 115JB. For all these reasons, the decision of Apollo Tyres' case (supra) would not apply.

Further submission is that the tariff realized from the beneficiaries as per the invoice is final and no part of it is in the nature of advance as the electricity for which invoices were raised by the applicant, was not only supplied but was also consumed by the beneficiaries, therefore, the same has to be regarded as reserve in the accounts. The applicant is under the obligation to maintain its books on accrual basis as per Section 209 of the Companies Act and accounting policy disclosed for maintenance of accounts. The invoice amount representing the sale of electricity has to be included in the year in which it is received for the purpose of computation of book profit under Section 115JB.6. In the light of the above contentions, we shall consider the aforementioned question which requires us to give advance ruling on, whether the AAD is to be included for the computation of book profit under Section 115JB of the IT Act in the year of receipt or in the year depreciation relates to. Indeed, the proper query should be whether AAD could be deducted from the sale price for the computation of book profit under Section 115JB of the Act. Be that as it may, in the context of the said question, it would be necessary to read Section 115JB of the Act, which runs as follows : 115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the first day of April, 2001, is less than seven and one-half per cent of this book profit, such book profit shall be deemed to be total income of the assessee and the tax payable by the assessee on such

total income shall be the amount of income-tax at the rate of seven and one-half per cent.

(2) Every assessee, being a company, shall, for the purposes of this section, prepare its P&L a/c for the relevant previous year in accordance with the provisions of Parts n and in of Sch. VI to the Companies Act, 1956 (1 of 1956) : Provided that while preparing the annual accounts including P&L a/c,- (ii) the accounting standards, adopted for preparing such accounts including P&L a/c; (iii) the method and rates adopted for calculating the depreciation, shall be the same as have been adopted for the purpose of preparing such accounts including P&L a/c and laid before the company at its annual general meeting in accordance, with the provisions of Section 201 of the Companies Act, 1956 {1 of 1956): Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 {1 of 1956), which is different from the previous year under this Act,- (ii) the accounting standards adopted for preparing such accounts including P&L a/c; (iii) the method and rates adopted for calculating the depreciation, shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including P&L a/c for such financial year or part of such financial year falling within the relevant previous year.

Explanation.--For the purposes of this section, "book profit" means the net profit as shown in the P&L a/c for the relevant previous year prepared under Sub-section (2), as increased by - (a) the amounts of income paid or payable, and the provision therefor; or (b) the amounts carried to any reserve, by whatever name called, other than a reserve specified under Section 33AC; or (c) the amount or amounts set aside to provisions made for meeting liability, other than ascertained liabilities; or (d) the amount by way of provision for losses of subsidiary companies; or (f) the amount or amounts or expenditure relatable to any income to which Section 10 (other than the provisions contained in Clause (23G) thereof) or Section 10A or Section 10B or Section 11 or Section 12 apply.

If any amount referred to in Clauses (a) to (f) is debited to the P&L a/c, and as reduced by- (i) the amount withdrawn from any reserve or provision (excluding a

reserve created before the 1st day of April, 1997 otherwise than by way of debit to the P&L a/c), if any such amount is credited to the P&L a/c : Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997, shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was drawn) under this Explanation or Explanation below the second proviso to Section 115JA, as the case may be; or (4) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below Sub-section (2) of s, 288, certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under Sub-section (1) of Section 139 or along with the return of income furnished in response to a notice under Clause (i) of Sub-section (1) of Section (5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

This section was inserted by the Finance Act, 2000, w.e.f. 1st April, 2001. This is a special provision enacted, simplifying the application of the principle of MAT, for payment of tax by certain category of companies. Sub-Section (1) thereof commences with a non obstante clause and incorporates a deeming provision to treat book profit as the total income of a company where the tax on its total income of any previous year (after 1st April, 2001) under the Act is less than 7-1/2 per cent of its book profit. It provides that notwithstanding anything contained in any other provision of the Act if in the case of a company, the income-tax payable on the total income as computed under the Act, in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, then the total income of such company shall be deemed to be the book profit and income-tax on such total income shall be levied at the rate of seven and one-half per cent It is enjoined by Sub-section (2) that every company must prepare its P&L a/c in accordance with the provisions of Parts n and in of Sch. VI to the Companies Act. It has two provisos. The first proviso directs that while preparing the annual accounts including P&L a/c, the following factors shall be the same as have been adopted

for the purposes of preparing such accounts including, P&L a/c for laying before the annual general meeting of the company in accordance with the provisions of Section 210 of the Companies Act. The factors referred to above are : (ii) the accounting standards adopted for preparing such accounts including P&L a/c; (iii) the method and rates adopted for calculating the depreciation, shall be the same as have been adopted for the purpose of preparing such account including P&L a/c and laid before the company at its annual general meeting in accordance with the provisions of Section 201 of the Companies Act, 1956 (1 of 1956).

The second proviso speaks of the situation where the company's financial year under the Companies Act is different from the previous year under the Act. This proviso is not relevant for our purpose, For purposes of this section, the Explanation appended thereto embodies the definition of 'book profit' to mean the net profit as shown in the P&L a/c for the relevant previous year prepared under Sub-section (2), referred to above, as increased by the amounts specified in Clauses (a) to (f) thereof. The other part of the Explanation is not material. Sub-section (4) of Section 115JB requires every company, to which this section applies, to furnish a report in the prescribed form from an accountant as defined in the Explanation to Sub-section (2) of Section 288 (chartered accountant within the meaning of Chartered Accountant Act, 1949, including in relation to any State any person who is entitled to act as auditor of the company registered in that State) certifying that the book profit has been computed in accordance with the provisions of that section along with the return of income filed under Sub-section (1) of Section 139 or along with the return of income furnished in pursuance to a notice under Clause (i) of Sub-section (1) of Section 142. As far as we could see, we found nothing in Section 115JB in regard to the treatment of amount of AAD component of total sale price nor could we find any provisions in Parts and IE of Sch. VI of the Companies Act which would justify the action of the applicant in deducting the AAD component from the total sale price of the electricity. When a question was pointedly asked to Mr. Eradi as to under what provision was the AAD component taken away from the total sale price for computation of book profit, he placed reliance on the opinion of the expert advisory committee of Institute of Chartered Accountants of India for adopting such accounting practice and certification of accounts by auditors.

7. Inasmuch as the expert advisory committee of Institute of Chartered Accountants of India is an expert body, its opinion is undoubtedly entitled to great weight. We perused the opinion of the committee.

Paragraph 4 thereof is in the following terms : "The Committee is of the view that the advance against depreciation is allowed with the objective of enabling the electricity company to recover depreciation higher than that as would be allowed as per the rates of depreciation applicable as notified by the Central Government from time to time for the purpose of fixation of electricity tariff so that the company may be able to generate internal resources for the payment of loans. The Committee further notes from the facts of the query that this advance against depreciation will be adjusted in later years when the depreciation at rates fixed for tariff purposes exceeds the advance against depreciation. In other words, the advance against depreciation is basically a timing difference." From the above excerpt of the opinion, it is noticed that the committee proceeded on the premise that AAD (a component of tariff) is allowed with the objective of enabling the electricity company to recover depreciation higher than that as would be allowed as per the rates of depreciation applicable as notified by the Central Government from time to time for the purpose of fixation of electricity tariff so that the company may be able to generate internal resources for the payment of loans and that this AAD will be adjusted in later years when the depreciation at the rates fixed for tariff purposes exceeds the AAD. It is expressed that the AAD "is basically a timing difference". It is also noted in the opinion that in view of para 2.5(i) of the Guidance Note on Accrual Basis of Accounting issued by the ICAI "revenue is recognized as it is earned" and where revenue, or a part thereof, received/receivable, during a particular period, is to be adjusted in future, to that extent the revenue received/receivable is not considered as earned, but is treated as revenue received in advance and on that basis it is opined that in the present case part of the tariff, which arises because of inclusion of AAD, should be treated as revenue received in advance since the said advance will be adjusted in later years against the depreciation. The committee concluded thus : "the Committee is of the opinion that advance against depreciation may be shown as a deduction from the sale of power as suggested by the querist in para 7 of the query. It should not be shown as a capital reserve but as income received in advance in the balance sheet'.

8. We may indicate that for the purpose of the present discussion, the relevant assessment years are 2001-02 and subsequent years. In the previous year relevant to this assessment year, the applicant has altered its practice of offering AAD as part of the income for tax purposes and sought support for its treatment of accounting from the abovementioned report. The centre of controversy is AAD. It would be necessary to notice the import of the expressions : depreciation, advance depreciation and AAD. Depreciation is defined by the Hon'ble Supreme Court to represent diminution in the value of a capital asset which is applied to the purpose of profit or gain [CIT v. Anand Theatres (2000) 244 ITR 192 (SC)]. It is an allowable deduction under Section 32 of the Act. It is neither an item of revenue nor can it be so treated under the IT Act. The fact that it is allowed to be recovered from beneficiaries by including it in cost structure under the notification of CERC is impertinent under the Act. Depreciation is admittedly worked out by the applicant on straight-line method which is in accordance with the provisions of the Electricity (Supply) Act, the CERC notification of 2001, the Companies Act as well as accounting standards. Advance depreciation would mean the expected diminution in value of a capital asset in future; in other words depreciation on a capital asset in future years before it becomes due as an allowable deduction under Section 32. AAD is an expression which is neither used in the IT Act nor in the Companies Act. To enable the electricity generating companies to raise additional revenue to discharge the loan raised on equipments/projects, the CERC coined the expression of AAD for including it as one of the components of tariff in addition of usual depreciation. Clause (iii) of sub para (b) of para 3.5.1 of Notification No. L-7/25(1)/2001-CERC, dt. 26th March, 2001, issued by CERG provides thus : "Advance against depreciation (AAD), in addition to allowable depreciation, shall be permitted wherever originally scheduled loan repayment exceeds the depreciation allowable as per schedule and shall be computed as follows : $AAD = \text{Originally scheduled loan repayment amount} - \text{depreciation as per schedule}$ subject to a ceiling of 1/12th of original loan amount minus depreciation as per schedule". It is seen from the extract that AAD is a variable amount. It is computed with reference to loan amount and allowable depreciation on a capital asset. It will be useful to refer to the order of CERC, dt. 1st Nov., 2002 for the period 1st April, 2001 to 31st March, 2004. Paragraph 17 of the order insofar as it is relevant for our purpose may be

extracted here : "The commission in the norms of tariff notified on 26th March, 2001 has made a provision for advance against depreciation, in addition to allowable depreciation. Advance against depreciation is permitted wherever original scheduled loan repayment exceeds the depreciation allowable. The amount of advance against depreciation is to be worked out by applying the ceiling of 1/12th of the original loan amount less depreciation allowed as provided in the notification dt.

26th March, 2001. For working out advance against depreciation for the present tariff period, 1/12th of the gross loan amount has been considered. The amount of advance against depreciation for different years of the tariff period in this case has been worked as under : (Rs. In crores)-----Year 1/12th of Scheduled Minimum Depreciation Advance Loan(s) Repayment of Col.

during the	against	of	Loan(s)	(2)&(3)	year	Depreciation	=	(4)	-
(5)-----	(1)	(2)	(3)	(4)	(5)				
(6)-----	2001-2002	186.72	538.34						
186.72	81.53	105.19							2002-
2003		186.72		245.06		186.72			81.53
105.19									2003-2004
224.33	186.72	81.53	105.19						

The revised total fixed charges determined by CERC (Para 26 of the order) in a Tabular form reads as follows :------Particulars 2001 -02 2002-

03	2003-04								Interest on loan
160.3	112.32	83.74							Interest on working capital
14.86	14.51	14.07							Depreciation
81.53	81.53	81.53							Advance against depreciation
105.19	105.19	105.19							Return on equity
158.34	158.34	158.34							O&M expenses
62.94	66.72	70.72							Total
583.16									
538.61	513.59								

----- It is seen that depreciation and AAD are added as components of tariff to enable such companies to raise revenue. There is nothing in the said notification or the aforementioned order, which requires AAD to be adjusted against future years, Clause (iv) speaks of remaining depreciable value of the asset when it says that

on repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.

9. The applicant supplied electricity at the tariff rate notified by CERC and recovered the sale price from the beneficiaries, which undoubtedly became its income. At no part of time in future, the sale price or any part thereof is refundable or adjustable against the future bills of the beneficiaries. Inasmuch as Section 209 of the Companies Act specifically requires that the accounts of the company should be maintained on accrual basis and the sale price of the energy as per the notified tariff {which includes AAD} has been received in accordance with invoice raised by the applicant, it would be the income of the company in the year of receipt and it is also shown as such (gross sales) in the P&L account. However, for the purpose of computation of book profit of the business of the applicant, the AAD component is deducted from total sales and the balance amount net of AAD has gone into P&L a/c and book profit.

10. Now reverting to the opinion of the expert committee which rendered opinion on the facts presented to it by the applicant. The above discussion discloses that the premise on which the opinion of the expert committee is fallacious, therefore, the opinion based on misconception of facts cannot be acted upon.

11. It was next contended that the sale price after deduction of AAD was accepted by the auditors and other statutory authorities and that, in view of the decision of the Hon'ble Supreme Court in Apollo Tyres' case (supra), the book profit as shown in P&L a/c had to be accepted.

It would be useful to refer to the decision of the Hon'ble Supreme Court in Apollo Tyres Ltd. v. CTT (supra). In that case the assessee-company while determining its net profit for the relevant accounting year provided for arrears of depreciation in its P&L a/c.

The Revenue objected to it on the ground that it was not in accordance with Parts II and III of Sch. VI to the Companies Act and accordingly recomputed the P&L a/c of the company by deleting the arrears of depreciation for purposes of Section 115J of the Act. The action of the AO was held to be not in accordance with law by

the Tribunal (ITAT); however, the High Court of Kerala took a different view. On appeal, the Hon'ble Supreme Court held that the AO had no jurisdiction to go behind the net profit shown in the P&L a/c except to the extent provided in the Explanation to Section 115J of the Ad After examining the object of introducing Section 115J, the Hon'ble Supreme Court observed : "If we examine the said provision in the above background, we notice that the use of the words "in accordance with the provisions of Part n and HI of Sch. VI to the Companies Act" was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, an AO under the IT Act has to accept the authenticity of the accounts With reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinized and certified by the statutory auditors and will have to be approved by the company in its general meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the Revenue that it is still open to the AO to rescrutinize this account and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act.....

If the legislature intended the AO to reassess the company's income, then it would have stated in Section 115J that "income of the company as accepted by the AO". In the absence of the same and on the language of Section 115J, it will have to be held that the view taken by the Tribunal is correct and the High Court erred in reversing the said view of the Tribunal".

It was opined that the AO while computing the income under Section 115J, has only the power of examining whether the book of account are certified by the authority under the Companies Act as having been properly maintained in accordance with the Companies Act. The AO thereafter has limited power of making increase or reduction provided for in Explanation to the said section. It was held, "to put it differently, the AO did not have the jurisdiction to go behind the net

profit shown in the P&L a/c except to the extent provided in the Explanation to Section 115J".

Having regard to the contention of Mr. N.P. Sahani that the provisions of s, 115J are materially different from the provisions of Section 115JB, therefore, the said decision of the Hon'ble Supreme Court would not apply, we have carefully gone through the provisions of Sections 115J and 115JB. A comparison of these sections shows that Sub-section (1) of both sections refer to different backgrounds and prescribe different percentages for levying tax; however, the requirements of Sub-section (1A) of Section 115J and Sub-section (2) of 115JB, are the same. It is true that the proviso of Sub-section (2) of Section 115JB has no parallel provision in 115J but the Explanation to Sub-section (1A) of Section 115J and the Explanation to Sub-section (2) of 115JB are in pan materia. The differences referred to above, are not material; the substance of both the provisions is the same. The contention of the Revenue, therefore, lacks merit.

12. The ratio of the decision of Hon'ble Supreme Court in Apollo Tyres' case (supra) is that after the accounts of a company are certified by the auditors of the company as having been maintained in accordance with the provisions of the Companies Act and acceptance of the same by the annual general meeting of the company as well as the Registrar of Companies, the AO has no power to reopen the accounts except to the extent provided in the Explanation in 115J. In the context of the case on hand, the AO can justifiably verify whether the statutory auditor has certified that the accounts of the company including P&L a/cs have been prepared in accordance with the provisions of Parts n and EI of Sch. VI to the Companies Act and whether they are laid before and approved by the annual general meeting of the company and the Registrar of the Companies. If these requirements are satisfied, he can only increase the book profit by adding amounts referred to in Clauses (a) to (f) to the Explanation of Sub-section(2) of Section 115JB, if the circumstances so justify.

13. Mr. V.U. Eradi endeavoured to point out that the statutory auditor certified the P&L a/c of the applicant as having been maintained in accordance with the provisions of Parts II and EI of Sch. VI to the Companies Act and that as the

applicant is a public sector undertaking, the CAG also examined the accounts; the accounts were laid before the annual general meeting of the company and were approved and they were also sent to the Registrar of Companies. Therefore, the accounts had attained finality. Mr. N.P. Sahani, on the other hand, contended that AAD was a part of the sale price of electricity and was shown as such against the gross sales by the applicant; deducting the AAD component from the gross sales, was not in accordance with either the IT Act or the Companies Act. The certification by the auditor is qualified and that qualification was accepted both by the CAG as well as the annual general meeting of the company. In any event, submitted by Mr. Sahani, the amount representing AAD is shown by the applicant (1) as reserve; (2) an item in the deferred tax liability; and (3) in the note appended to the return of the income, it is stated that the question of adding AAD in total income of the applicant is sub judice before AAR, therefore, the accounts cannot be said to have attained finality; the deducted amount of AAD has to be added back to the book profit.

14. In the light of the aforementioned decision of the Hon'ble Supreme Court, we shall examine whether the certification by the statutory auditor is a qualified certification. In the P&L a/c for the asst. yr.

2001-02 total sales are shown as Rs. 12,766 millions. From the said amount Rs. 1,338 million, representing AAD, was deducted and shown in the balance sheet as income received in advance as part of Rs. 5,199 million. Nothing is mentioned about the treatment of AAD in the significant accounting policies and notes to the accounts. In the certification of the auditors, there are no comments in regard to the treatment of AAD. It is noticed that in the review of the accounts by the CAG, total sales are shown at Rs. 11,428 million, which is net of AAD. In the company's general business profile, AAD is shown as part of the reserves. However, in the directors report dt. 12th Oct., 2001, the figure against sales is shown as Rs. 12,766 million which is inclusive of AAD. We have also perused the P&L a/c of asst. yr. 2002-03 wherein the figure of sales is shown as Rs. 13,496 million and therefrom the figure of AAD amounting to Rs. 1,286 million is deducted and net sales are shown at Rs. 12,210 million. The balance sheet shows AAD as income received in advance. The accounting policy mentions as follows : "Advance

against depreciation given as component of tariff in the initial years to facilitate repayment of loan is reduced from sales and considered as deferred income to be included in sales in subsequent years." There are certain qualifications in the auditors report but the clauses referred to therein do not deal with AAD. Similarly, there is no mention of AAD in the comments of CAG. From the above, it appears to us that the figure of sales of electricity mentioned after deducting AAD component was certified by the auditor as being in accordance with the provisions of the Companies Act, referred to above and the same has been laid before the annual general meeting of the company. Thus, there cannot be any doubt that the accounts have attained finality.

However, if the amount of AAD, deducted from total sale price, falls under Clauses (a) to (f) of the Explanation to Section 115JB, only then the book profit can be increased by adding that amount. Here two factors must be considered. The first is that the amount representing AAD was shown by the applicant as 'reserve' in company's general business profile as well as income received in "advance" in the balance sheet. It is argued before us by Mr. Eradi that the amount does not fall within the meaning of the 'reserve' as interpreted by the Hon'ble Supreme Court in *Vazir Sultan Tobacco Co. Ltd. v. CIT* (1981) 132 ITR 559 (SC). The distinction between a provision and a reserve is pointed out by the Hon'ble Court as follows : "the broad distinction between the two is that whereas a "provision" is a charge against the profits to be taken into account against gross receipts in the P&L a/c, a "reserve" is an appropriation of profits, the asset or assets by which it is represented being retained to form part of the capital employed in the business.

It will be useful to quote the following observation, "the question whether the concerned amounts constitute "reserves" or not will have to be decided by having regard to the true nature and character of the sums so appropriated depending on the surrounding circumstances, particularly the intention with which and the purpose for which such appropriations had been made." 15. In our view, in the circumstances of the case the amount of AAD so set apart from the sales in the P&L a/c, is nothing short of creation of 'reserve'. The Addl. CIT is right in his submission that when the applicant has itself shown the amount of AAD as 'reserve' it is not open to it to argue that the amount does not answer the

description of the definition of reserve as that amount was admittedly deducted from the gross sales and kept apart as reserve. As 'reserve' it falls within Clause (b) of the Explanation which reads : the amounts carried to any reserves, by whatever name called (other than a reserved specified under Section 33AC). Admittedly, it is not a 'reserve' specified under Section 33AG. Therefore, in the light of the judgement of the Hon'ble Supreme Court in Apollo Tyres' case (supra), AAD can be added to the total income for the purpose of arriving at the book profit within the meaning of the Explanation.

We have already shown above that the opinion of the expert cannot be acted upon. Therefore, AAD cannot be treated as income received in advance. Further, it is not a case where the applicant has received the amount but did not supply electricity to the beneficiaries. For these reasons AAD cannot be treated as "income received in advance".

16. It is necessary to notice that along with the report of the chartered accountant (Form No. 29B) under Section 115JB of the Act for computing book profit of the company, Annex. A to the report and notes attached to the IT return for the asst. yr. 2001-02, have been furnished to us. Note Nos. (5) and (6) are relevant for our purpose and they read as follows : (5) The question as to whether the provisions of Section 115JB apply in relation to the amount of advance against depreciation amounting to Rs. 1,338.10 millions is sub judice before the Appropriate Authority for Advance Ruling and as such the same is not included for the purpose of computing the MAT. (6) The report under Section 115JB of the IT Act in Form No. 29B has been obtained from the statutory auditor and is attached with the return of income.

From a perusal of Note (5) quoted above, it is clear that in the IT return of the applicant, the treatment of the amount representing AAD (for the purposes of determining book profit under Section 115JB and the total income) was made subject to the ruling of the Authority.

Further, the plea of finality of the P&L a/c, in the light of above discussion, would not be relevant before the Authority in answering the question. It is not in dispute that the amount representing AAD as a component of tariff has accrued to the

applicant as part of sale price and indeed it was so shown in the gross sales in the year of its receipt. No other statutory provision or rule is brought to notice to justify the accounting practice of the applicant in deducting AAD from total sale price.

17. In the light of the above discussions, we rule on question (a) that the amount of advance against depreciation is to be included for the computation of book profit under Section 115JB of the IT Act in the year of receipt.

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